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July 21, 2006

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
9300 East Hampton Drive
Capitol Heights, MD 20743

Subject: In the Matter of Implementation of Pay Telephone Provisions
CC Docket No. 96-128

Dear Madam Secretary:

In accordance with Section 1.1206 of the Commission's rules, 47 C.F.R. Section 1.1206, we hereby provide you with notice of an oral and written ex-parte, presentation in connection with the above-captioned proceeding. On July 20, 2006, Brooks E. Harlow of Miller Nash LLP, and Robert Aldrich, of Dickstein Shapiro, LLP, met with Ian Dillner and Matt Warner, advisors to Commissioner Tate. Mr. Harlow appeared on behalf of the Northwest Public Communications Council ("NPCC") and the plaintiffs/appellants in *Davel Communications, et al. v. Qwest*, Ninth Circuit Case No. No. 04-35677 ("*Davel* case"). Mr. Aldrich appeared on behalf of the American Public Communications Council. At the meeting we discussed the matters summarized in the attached documents. We also described the background of the *Davel* case and Oregon PUC case identified in the attached materials.

We trust you will find this information to be useful. Should you have any questions or require any additional information, please contact the undersigned counsel directly.

Very truly yours,

Brooks E. Harlow

Brooks E. Harlow

cc: Mr. Ian Dillner (via e-mail)
Mr. Matt Warner (via e-mail)
Mr. Robert Aldrich (via e-mail)

MILLER NASH LLP
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Ex Parte Submission on Behalf of Northwest Public Communications Council

Regarding pending petitions of for declaratory ruling of:

Illinois Public Telecommunications Association ("IPTA") (July 30, 2004)
Independent Payphone Association of New York ("IPANY") (Dec. 29, 2004)
Southern Public Communications Association ("SPCA") (Nov. 9, 2004)
And
Florida Public Telecommunications Association ("FPTA") (Jan. 31, 2006)
("Petitions")

CC Docket 96-128
May, 2006

Outline and Selected Formal Comments

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I. Update re status of ***Qwest*** cases.

A. Ninth Circuit opinion rejects Qwest defenses to refunds (11 states)

- "[T]he filed-tariff doctrine does not bar a suit to enforce a command of the very regulatory statute giving rise to the tariff-filing requirement..."
- **The filed-tariff doctrine does not apply to the refund requirement** because the FCC expressly required a departure from the filed rates (i.e., refunds).
- However, the FCC should determine the *length* of the refund period; i.e., whether refunds are only owed for 45 days after Waiver Order or whether refund period continues until such a time as Qwest files NST-compliant tariffs.

B. Oregon PUC case (*Northwest Pub. Comm. Council, "NPCC" v. Qwest*)

- Case is on remand and state Circuit Court has retained jurisdiction
- OPUC holding case in "abeyance," pending FCC action
- OPUC wrote to Chmn. Martin on 11/23/05, requesting guidance
- Circuit Court gave OPUC until 8/21/06 to act or report back

II. The Commission's Ruling on the Pending Petitions[1] Involves a Simple Fact Pattern and Should be Decided Based Application of Simple Legal Requirements

A. Congress forbade the RBOCs from discriminating against PSPs[2] after April 15, 1997—47 USC § 276(a)

B. Per Congress' directive, the Commission held that an RBOC could only eliminate discrimination by complying with the new services test ("NST")

C. In most states, the RBOCs did not comply with the NST for many years; in most Qwest states, ***Qwest did not even make any NST filings until 2002***

D. Thus, the RBOCs violated § 276(a), the Commission's payphone orders, and the Commission's "*Refund Order*" (DA 97-805)

- The Commission should at least interpret—if not enforce—its *Refund Order*
- Apart from the *Refund Order*, PSPs independent cause of action for damages under §§ 206 and 207 for RBOCs' violation of § 276(a)

E. Because the Commission adopted a Federal standard, the RBOCs' state law-based defenses, such as filed tariff, do not apply, as the Ninth Circuit has now established

F. Qwest has received an unlawful windfall at the expense of the PSPs

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[1] IPTA, IPANY, SPCA, and FPTA (plus the Massachusetts Supreme Court questions)
[2] Payphone service providers

ILLUSTRATIVE[3] QWEST PAL RATES BEFORE AND AFTER NST-COMPLIANCE

QWEST STATE	QWEST PAL RATES,[4] 1997-2002	NEW QWEST PAL RATES AFTER 2002	DOLLAR AMOUNT OF RATE CHANGES	PERCENT 97-02 RATES EXCEEDED NST RATES
AZ	$34.30	$10.44	-$23.86	229%
CO	$43.54	$15.04	-$28.50	189%
ID	$58.74	$16.41	-$42.33	258%
IA	$31.35	$14.20	-$17.15	121%
MN	$43.61	$15.13	-$28.48	188%
MT	$38.94	$16.91	-$22.03	130%
NE	$33.80	$19.32	-$14.48	75%
NM	$43.74	$12.80	-$30.94	242%
ND	$31.54	$11.93	-$19.61	164%
OR	$30.50	$9.73	-$20.77	213%
SD	$38.65	$18.99	-$19.66	104%
UT	$37.00	$24.79	-$12.21	49%
WA	$28.89	$14.10	-$14.79	105%
WY	$28.10	$18.58	-$9.52	51%

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Attorneys for Davel Communications, et al.

[3] These rates are "illustrative" because Qwest has multiple rate plans in most states. In some states rates are measured, so the basic line rate plus estimated usage and mandatory EAS charges are shown. The rates shown exclude EUCL, taxes, and fees.

[4] Public Access Line plus Fraud Protection, a/k/a screening

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of: Implementation of the Pay Telephone Reclassification and Compensation Provisions of the telecommunications Act of 1996 Petition of the Florida Public Telecommunications Association, Inc. for a Declaratory Ruling and for an Order of Preemption Concerning the Refund of Payphone Line Rate Charges	Case No. CC Docket No. 96-128 COMMENTS OF NPCC AND MIPA IN SUPPORT OF PETITION OF FPTA FOR DECLARATORY RULING

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Dated: February 28, 2006

I. INTRODUCTION

The Northwest Public Communications Council ("NPCC") and Minnesota Independent Payphone Association ("MIPA") are trade associations representing the interests of payphone service providers ("PSPs") in Oregon, Washington, Idaho, and Montana (NPCC) and Minnesota (MIPA). The NPCC and MIPA file these comments on the Petition of the Florida Public Telecommunications Association ("FPTA") For A Declaratory Ruling And For An Order Of Preemption ("Petition") pursuant to the Commission's Public Notice dated February 8, 2006. As the Commission is aware, similar petitions were filed by the Illinois Public Telecommunications Association ("IPTA"), the Independent Payphone Association of New York ("IPANY"), and the Southern Public Communications Association ("SPCA") on various dates in 2004. Collectively all four petitions will be referred to as the "Petitions."

NPCC and MIPA filed formal comments in this docket in support of several of the Petitions on August 26, 2004, and January 18, 2005. NPCC and MIPA hereby incorporate those prior comments herein by this reference. As NPCC and MIPA noted in their January, 2005 comments, the four states involved in the Petitions are not alone. Actions involving refunds or damages for RBOCs' violations of Section 276 are pending involving almost two dozen states. The NPCC and MIPA urge this Commission to issue an order on the Petitions that would provide guidance for the other states. In so doing, the NPCC and MIPA urge the Commission to provide broad policy guidance to ensure proper implementation of the non-discrimination requirements of Section 276. Procedurally, however, NPCC and MIPA urge the Commission to keep its decision narrow and address only the precise procedural issues raised by the pending Petitions.

II. OTHER STATES ARE SEEKING OR WOULD BENEFIT FROM FCC GUIDANCE

The FPTA Petition merely serves once again to highlight the pressing need for FCC guidance to the states. The Commission has a significant interest in ensuring that Section 276 of the Telecommunications Act of 1996 is interpreted and applied consistently among the states and consistent with Congress' and the Commission's intent. As the Commission noted in *In the Matter of Wisconsin Public Service Commission*, 17 F.C.C.R. 2051, 2064 ¶ 2 and Note 10

(2002) ("*Wisconsin Order*"), state commissions were inconsistent in applying the FCC's New Services Test ("NST")to payphone access services. Likewise, state commissions have been inconsistent in ordering refunds for overcharges for payphone access services even where RBOCs admittedly or demonstrably failed to comply with the FCC's New Services Test by April 15, 1997, or the extended deadline of May 19, 1997.

A. OREGON

The Commission should grant the Petitions and, as it did in *Wisconsin*, provide guidance for states, some of which are actively seeking prompt guidance from the Commission. One of the states that is actively seeking the Commission's guidance regarding proper application of federal law on refunds is Oregon. The need for FCC guidance has become even greater in Oregon since the NPCC and MIPA filed their comments in January 2005. Although NPCC was actively pursuing Qwest's refund obligations before the Oregon Public Utilities Commission ("PUC" or "OPUC"), the PUC decided to suspend action on NPCC's refund complaint pending FCC action on the Petitions in this docket. Attached are two orders of the Oregon PUC: Ruling, Disposition: Proceeding held in abeyance, *The Northwest Public Comm's Council v. Qwest Corp.* (Dkt. DR 26/UC 600, March 23, 2005) (Attachment 1); and Order, Disposition: ALJ Ruling Affirmed, *The Northwest Public Comm's Council v. Qwest Corp.*, Order No. 05-208 (Dkt. DR 26/UC 600, May 3, 2005) (Attachment 2).

In Order No. 05-208, the Oregon PUC affirmed the ALJ Ruling holding the NPCC's refund complaint case in abeyance pending the outcome of the FCC's rulings on the Petitions to, "provide the FCC an opportunity to fashion a comprehensive solution to the issues in a manner consistent with the requirements set forth in its *payphone orders*." *Id.* at 3.

1. Background of Oregon Case

NPCC's case in Oregon, which NPCC and MIPA outlined in comments filed on January 18, 2005 in this docket, is similar to each of the Petitions in some respects. For example, like Bell South in Florida, Qwest continued to discriminate against its payphone competitors in violation of Section 276(a) by failing to comply with like the NST for many years after April 15, 1997.[3] Also, like the IPTA, NPCC was in continuous litigation with Qwest from the time Qwest was to have complied with the new services test for pricing its payphone access lines in early 1997. Qwest ultimately lost that litigation in November 2004, when the Oregon Court of Appeals found that Qwest's filings with the OPUC in early 1997 did not comply with the FCC's *Payphone Orders*. *See Northwest Public Comm's Council v. PUC*, 100 P3d 776 (Or. App. 2004).

Qwest's Oregon payphone access line rates, which were over $34 per month in early 1997, dropped to under $10 when Qwest finally complied with the NST. Qwest was, in effect, charging its competitors more than three times as much as it was charging its own payphone division for network services. However—in spite of a final and unappealable order holding that Qwest's 1997 rates did not comply with the NST or Section 276(a) of the Communications Act for many years after 1997—Qwest has refused to refund its unlawful overcharges.

NPCC filed a complaint against Qwest with the OPUC seeking refund. However, the OPUC has not acted on that complaint because it is awaiting guidance and clarification from the FCC. However, the OPUC indicated it would not wait indefinitely for this Commission's guidance:

> In reaching this decision, we note that the ALJ's decision does not postpone this matter indefinitely. The ruling allows the parties to move to reopen the proceeding if circumstances arise warranting such action. To ensure there is no undue delay, the parties may ask the Commission to revisit this matter <u>if the FCC has not acted by the end of this year</u>.

Order No. 05-208 at 3 (emphasis added).

2. <u>Current Status of Oregon Case</u>

The OPUC has become somewhat more proactive since its orders merely holding NPCC's refund claim in abeyance. Attached is the November 23, 2005, letter from the Oregon Public Utility Commission ("OPUC") addressed to Chairman Martin (Attachment 3) regarding

[3] While the cases arise from similar facts, procedurally NPCC's case is different from that of FPTA (as well as IPTA, IPANY and SPCA) because there is no final state decision in Oregon on refunds.

CC Docket No. 96-128. The OPUC requested prompt action by the Commission on petitions for declaratory ruling in the Payphone Docket to serve as guidance for a similar docket pending at the OPUC. Although they were not explicitly identified by the OPUC, the letter clearly referred to the petitions filed by IPTA, IPANY, and the SPCA.

Because the OPUC was reversed in 2004 on its interpretation of the FCC's application of the NST to PAL rates (in an Order issued before FCC Order No. 02-25 in the Wisconsin case), the OPUC sensibly seeks guidance from the Commission before issuing a ruling on NPCC's refund claim. Some of Qwest's defenses to the OPUC action raise the same issues that are involved in the Petitions. A ruling by the Commission on the points discussed below would enable the OPUC to properly interpret and apply federal law to the claim against Qwest.

The Commission should also be aware that the OPUC may not have the luxury of awaiting Commission guidance indefinitely. The PUC case is on remand from the Marion County, Oregon Circuit Court, which retains jurisdiction. The Circuit Court has required periodic status reports on the OPUC's action on the remand of NPCC's refund claims. The case was remanded to the PUC on March 1, 2004. Thus, the court has been awaiting PUC action for two years. At the most recent status conference, the court required the parties to report the status to the court on August 21, 2006. At that time the court may order the OPUC to rule notwithstanding the lack of FCC guidance.

B. COLORADO, IDAHO, IOWA, MINNESOTA, NEBRASKA, NEW MEXICO, NORTH DAKOTA, SOUTH DAKOTA, UTAH, WASHINGTON, AND WYOMING

Fifty one payphone service providers (PSPs), including a number of members of the NPCC and MIPA, brought suit against Qwest in the U.S. District Court for the Western District of Washington in 2003 (*Davel Communications, Inc. et al. v. Qwest Corp.* Case No. 03-3680P ("*Davel*")). The complaint alleged that Qwest had violated Commission orders and Section 276(a) of the Communications Act, damaging the PSPs by discriminating against them by charging them double or triple was Qwest had charged itself from 1997 to 2002 for access line service. The District court dismissed the case in the erroneous belief that the filed tariff doctrine barred plaintiffs' claims. The case is now pending before the Ninth Circuit Court of Appeals.

Oral argument in the *Davel* case was heard by the Ninth Circuit on December 8, 2005. A decision is expected in the middle of 2006. In light of the Supreme Court's decision in *Brand X*,[2] the Ninth Circuit would likely give *Chevron*[3] deference to the Commission, if the Commission rules before the Ninth Circuit does. If the Commission does not rule before the Ninth Circuit, then that increases the chances that Section 276(a) will be interpreted in multiple and inconsistent ways.

III. <u>THE COMMISSION CAN PROVIDE BENEFICIAL GUIDANCE WITHOUT HAVING TO ADDRESS EVERY POTENTIAL PROCEDURAL ISSUE</u>

The NPCC and MIPA recognize that each of the four Petitions may have certain unique aspects. Nevertheless, they also raise broad issues that are common to the Petitions as well as to the cases against Qwest in two forums covering 12 states. The Commission can issue an order on the Petitions that will provide guidance to the OPUC and the Ninth Circuit, which will help ensure that the Commission's orders are applied uniformly and consistent with their purpose to implement Section 276(a). The Commission's orders in this docket were all intended to properly implement Congress' directive that, effective on April 15, 1997, "any Bell operating company . . . shall not prefer or discriminate in favor of its payphone service." *Id.*

The Commission should issue the broadest possible policy declaration on the substance of the Petitions. Specifically, the Commission should do everything it can to make it clear to state commissions and courts that the intent of Congress and the Commission's orders was to eliminate any and all RBOC discrimination <u>**effective on April 15, 1997**</u>, not years later as Qwest did. Any RBOC that had failed to comply timely with the FCC's New Services Test on

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[2] *National Cable & Telecom. Assn. v. Brand X Internet Services*, 545 U.S. ___, ____ S.Ct. ____, ___ L.Ed.2d ___ (2005)

[3] *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

that date was violating Section 276(a) by continuing to discriminate after the deadline for the end of such discrimination. Accordingly, any and all available procedural avenues to remedy the discrimination retroactive to April 15, 1997, should be favored as a matter of policy in order to implement Congress' directive.

While the Commission's substantive declaration should be broad, its procedural analysis should be crafted narrowly, addressing only the four Petitions that are before it today. The Commission should take care to avoid potential prejudice to the claims and defenses of other parties by making it clear that any procedural determinations are limited to the Petitions and should not be applied to cases that are not before the Commission. As NPCC and MIPA have noted in these and prior comments, NPCC's own experience in Oregon reflects a procedural background that is distinct from that in the pending Petitions. Likewise, the action pending in the Ninth Circuit involving 11 other Qwest states is unique. If not carefully crafted, a Commission ruling on procedural aspects of one of the Petitions could be misconstrued by state commissions and courts as applying to claims that are procedurally distinct from all of the Petitions.

The Commission can and should deal with several generic issues raised by the Petitions. In particular:

1. The Commission should declare that the "filed tariff" doctrine has no impact on the refund obligation or any damage claims under federal law where claimants prove RBOC violation of Section 276(a). Section 276 and the orders in the Payphone Docket expressly adopted ***federal*** regulations. The Waiver Order (DA 97-805, Apr. 15, 1997, a/k/a "Refund Order") imposed ***federal*** conditions for waiver of a ***federal*** requirement, and the RBOCs expressly waived any filed rate doctrine claims. The filed tariff doctrine that the RBOCs are asserting is founded on ***state*** law, because the rates were filed with ***state*** commissions, not a

federal agency. Thus under the Supremacy Clause of the U.S. Constitution, the filed tariff doctrine cannot block refund or damage claims based on federal law.[4]

2. The Commission should interpret the Refund Order broadly to require refunds by RBOCs regardless of whether they made voluntary rate filings within the 45 days following the Refund Order. Such an interpretation is necessary because:

(a) Failure to require refunds undermines Section 276(a). It would have the effect of allowing unlawful discrimination, in some cases (such as Oregon) for many years after the RBOCs were required to have stopped discriminating. Even absent the Refund Order, PSPs should have a right to refunds as damages for RBOCs' discrimination (e.g. under 47 U.S.C. Sec. 207) for charges that exceeded what the NST permitted going back as far as the longest applicable statute of limitations will allow.

(b) Without a federal ruling that refunds are required, the states will continue to inconsistently interpret and apply the Commission's rules and orders. For example, in one state, an RBOC that made a good faith effort to fully and timely comply with the Commission's order may be held liable for refunds, while in another state, an RBOC that did not seriously attempt to comply may be held exempt from refunds.

(c) The 45 day limitation in the Refund Order should be construed as a limitation on the RBOCs' right to collect dial around compensation, not on the obligation to pay refunds. The intent of the 45 days was to ensure prompt action. Interpreting the 45 days as a limitation on refunds rewards delay, which is the exact opposite of the order's intent in setting the 45 day limit.

IV. <u>CONCLUSION</u>

The NPCC and MIPA support the FPTA Petition and all the Petitions. Whether they are granted in whole or in part, however, the Commission should act promptly to provide guidance for the Oregon PUC and other states and courts that are faced with deciding similar

[4] There are other reasons that the filed tariff doctrine should not bar refund claims. However, federal pre-emption is the most salient.

issues. Prompt Commission action will help ensure consistent application of the Commission's orders and proper implementation of the non-discrimination requirements of Section 276(a).

DATED this 28th day of February, 2006.

Respectfully submitted,

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 96-128
Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	)	
Independent Payphone Association Of New York's Petition For Pre-Emption And Declaratory Ruling Concerning Refund Of Payphone Line Rate Charges	)	

COMMENTS OF THE NORTHWEST PUBLIC COMMUNICATIONS COUNCIL AND THE MINNESOTA INDEPENDENT PAYPHONE ASSOCIATION, IN SUPPORT OF PETITION FOR A DECLARATORY RULING

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Dated: January 18, 2005

SEADOCS:194751.1

The Northwest Public Communications Council and the Minnesota Independent Payphone Association ("Associations") support the petition of the Independent Payphone Association Of New York ("IPANY") for a declaratory ruling.[1]

Apart from ensuring that IPANY members receive the refunds they are due, it is critically important for two policy reasons that the Commission grant the IPANY petition. First, if the Commission fails to effectively enforce its orders and policies, that will give all the companies it regulates strong incentives to "see what they can get away with." Second, regrettably Verizon is not the only RBOC that delayed compliance with the Commission's New Services Test ("NST") pricing requirements for seven years by using and ***abusing*** state regulatory and appellate processes. Like Verizon, Qwest delayed NST compliance from 1997 until 2002, 2003—and beyond—and steadfastly refused to refund the millions of dollars it overcharged the Associations' members for all those years. The Qwest state commissions and appellate courts could benefit greatly from the FCC's proper interpretation of its orders that would result from granting IPANY's petition

I. GRANTING IPANY'S PETITION WOULD ENSURE THAT REGULATED COMPANIES DO NOT GET THE MESSAGE THAT IGNORING OR MISINTERPRETING COMMISSION ORDERS CAN BE REWARDING.

In deciding whether to address and grant IPANY's petition, the Commission needs to ask, what message does it want to send to the RBOCs and other companies it regulates? Like the IRS, the FCC relies almost entirely on voluntary compliance with its rules and orders by the industries it regulates. These industries are both savvy and motivated by their own financial interests. If they perceive that the Commission will allow them to delay or

[1] The Associations also support the petitions of the IPTA and the SPCA, filed earlier in 2004. The Associations filed comments on the IPTA petition on August 26, 2004, which are incorporated herein by reference in further support of the IPANY petition.

avoid entirely the implementation of Commission's *Payphone Orders*[2] that have a negative financial impact, they will behave accordingly in the future. That is precisely the situation implicated by the IPANY petition.

Verizon, Qwest, and the other RBOCs were ordered to file or seek approval of their payphone access line ("PAL") rates with the states in early 1997. Rather than file the substantial rate reductions that the NST required, Qwest and Verizon instead decided to first ignore the NST or to mislead state commissions regarding the requirements of the NST. Later they decided to challenge the Commission's interpretation of the NST and its authority to require cost-based tariffs—a battle the RBOCs lost. *New England Public Comm. Coun. v. F.C.C.*, 334 F.3d 69, 72-74 (D.C. Cir. 2003) (explaining the tortured history of those challenges).[3] Thus, through artful dodging and direct and collateral challenges to the Commission's orders that continued until 2003, the RBOCs enjoyed at least six years of unlawful and excessive rates at the expense of their payphone service provider ("PSP") competitors. If the RBOCs are not ordered to pay refunds retroactive to April 15, 1997, they will succeed in benefiting from either their intentional violation of the Commission's orders or (to be charitable) their erroneous interpretation of those orders.

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[2] *In the Matter of the Implementation of the Pay Telephone Reclassification And Compensation Provisions of the Telecommunications Act of 1996* CC Docket No. 96-128, Report and Order, 11 FCC Rcd. 20541, ¶¶146-147 (1996) ("*First Payphone Order*"), and Order on Reconsideration, 11 FCC Rcd. 21233 (1996), ¶¶131, 163 ("*Payphone Reconsideration Order*") *aff'd in part and remanded in part sub nom. Illinois Pubic Telecommunications Assn. v. FCC*, 117 F.3d 555 (D.C. Cir. 1997), *clarified on rehearing* 123 F.3d 693 (D.C. Cir. 1997) *cert. den. sub nom. Virginia State Corp. Com'n. v. FCC*, 523 U.S. 1046 (1998); Order, DA 97-678, 12 FCC Rcd. 20997, ¶¶ 2, 30-33, 35 (Com. Car. Bur. released April 4, 1997) ("*Waiver Order*"); Order, DA 97-805, 12 FCC Rcd. 21370, ¶ 10 (Com. Car. Bur. released April 15, 1997) ("*Refund Order*") (collectively "*Payphone Orders*").

[3] On May 13, 2002, Qwest, along with other RBOCs and LECs, definitively lost their second facial challenge to the FCC's authority to require state commissions to establish cost-based tariffs. *Verizon Communications, Inc. v. F.C.C.*, 535 U.S. 467 (2002).

Whether the RBOCs intentionally twisted the Commission's orders or acted in good faith, the signal that denying refunds would send is the same. There is huge benefit to be gained from "seeing what you can get away with" and no downside. Even a refund order is a relatively mild remedy. It has no punitive element whatsoever. It merely restores the PSPs and RBOCs to the financial position that the Commission intended all along would exist effective April 15, 1997.

II. OTHER RBOCS SUCH AS QWEST CONTINUE TO TRY TO USE STATE LAW PRINCIPLES TO CONVINCE STATE COMMISSIONS TO DENY THE REFUNDS THAT THIS COMMISSION ORDERED.

A. Like Verizon, Qwest fought NST-compliant PAL rates and now fights the Commission ordered refunds.

The Associations fully support the IPANY petition because they understand first hand how difficult it is to force an RBOC to comply with the NST at a state commission. The RBOCs simply did not or do not want to file compliant rates. Now they do not want to issue refunds. Unfortunately, as this Commission has noted in the past, state commissions have struggled to interpret and enforce the Commission's *Payphone Orders*.[4] The Commission's *Wisconsin Order* was invaluable to the states in getting some of the RBOCs, such as Qwest, to finally comply with the NST. But Qwest and others continue to fight refunds, tooth and nail, using many of the same state laws and procedures that they used to delay NST compliance for so many years. Qwest's actions in Oregon, discussed below, are a prime example.

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[4] *In the Matter of Wisconsin Public Service Commission: Order Directing Filings*, Bureau/CPD No. 00-01, Memorandum Opinion and Order, FCC 02-25, 17 FCC Rcd. 2051, ¶ 2 and Note 10 (Jan. 31, 2002)("*Wisconsin Order*") *aff'd sub nom. New England Public Communications Council, Inc. v. FCC*, 334 F.3d 69 (D.C. Cir. 2003).

The RBOCs need the Commission to tell them—***again***—that they must pay refunds from the date of compliance with the NST back to April 15, 1997. Hopefully the RBOCs will stop fighting refunds in the states and will voluntarily comply. If not, at least the FCC's order will provide helpful guidance to the state commissions and appellate courts, which are still struggling with the RBOC's arguments that misinterpret the letter and spirit of the Commission's orders.

B. Verizon's arguments to the New York tribunals that are contrary to the Commission's orders are similar to Qwest's ongoing arguments to the Oregon PUC to disregard Federal law and follow state law.

The tortured path the Payphone Service Providers ("PSPs") have been forced to travel in New York seems almost too incredible to be anything but a bad fiction novel. Yet it is virtually the same path that PSPs in Oregon have had to take. Like the PSPs in New York, PSPs in Oregon have had to contend with delays and continual litigation against Qwest from 1996 to date—over eight years—to get Qwest to comply with the NST. As Verizon misled the New York PSC, Qwest for years misled the Oregon PUC on application of the Commission's *Payphone Orders* and NST. Finally, on November 10, 2004, the Oregon Court of Appeals put an end to Qwest's artful dodging, reversing the OPUC for its failure (at Qwest's strong urging) to follow federal law.[5]

While the OPUC has yet to approve a PAL rate for Qwest as complying with the NST—nearly eight years after Qwest was supposed to have complied with it—indications are that Qwest over charged PSPs for PAL service by between $20 and $50 per line per month

[5] *Northwest Public Comm's Council v. PUC*, 196 Ore. App. 94, 100 P.3d 776 (2004). The time for Qwest to further appeal has run, making the decision final. However, the case will still have to be remanded to the OPUC for a final determination of compliant Public Access Line (PAL) rates. Thus, when this matter is finally concluded, it will have been eight or more years that Qwest's compliance with the NST will have been delayed in Oregon from the FCC's intended implementation date of April 15, 1997.

from April 15, 1997 through March 2003. In 1997 Qwest charged up to $60 per month or more[6] for PAL service. For most of 1998 to 2003, Qwest charged about $30 for PAL service. In 2003, Qwest slashed its Oregon PAL rate to under $10, alleging that the new rate complied with the NST. Thus, for seven years Qwest charged PSPs three times to six times the rate it should have been charging under the NST.

While the PSPs in Oregon are finally on the brink of obtaining an order from the OPUC that establishes what Qwest's PAL rates must be and should have been to comply with the NST, Qwest steadfastly refuses to honor its obligation to pay refunds once the rates are set. In a pending motion for summary judgment on the refund issue,[7] Qwest argues at length to the OPUC that the OPUC should follow the decision of the New York PSC and courts. The rest of Qwest's brief argues the same faulty rationale that the New York tribunals used to deny refunds. For example, Qwest argues that "Oregon law" prohibits a refund. Qwest argues that state law principals of "filed rate doctrine," "res judicata," and "standing" bar the NPCC from enforcing federal law requiring refunds. These state-law based defenses should have no relevance to the state proceedings relating to NST-compliance and refunds because of Federal pre-emption. As the NPCC and MIPA discussed in their August 26, 2004 comments in this docket, state laws (including state tariffs) that frustrate or block implementation of Section 276 and the FCC's orders were expressly pre-empted by Congress and the FCC.

[6] Until late 1997, Qwest imposed mandatory measured service on PSPs in Oregon with exorbitant usage charges, meaning that there was almost no upward limit to the PAL rate.

[7] The NPCC's refund complaint is a separate docket from Qwest's rate case. The NPCC has sought a partial summary judgment on liability only, with refunds to be determined after the OPUC sets a final PAL rate on remand from the Court of Appeals.

Even though Qwest's years of reliance on state law doctrines that Congress and this Commission pre-empted was struck down just two months ago by the Oregon Court of Appeals as to going-forward PAL rates, on refunds Qwest is once again trying to lead the OPUC astray. Qwest is misinterpreting this Commission's orders and urging the OPUC to apply state law doctrines to override the Commission's orders. The Commission's guidance on NST compliance going forward was extremely helpful to the states. In Qwest's 14 states, the *Wisconsin Order* lead to PAL rate reductions averaging about 50% to as much as about 70% within a year after the order was issued. By giving guidance on refunds, the Commission might similarly help to bring resolution to this contentious issue within a reasonable timeframe.

In short, IPANY's problems with Verizon are not unique. The NPCC trusts that OPUC will not so easily be led astray by Qwest after so recently having been reversed by the Court of Appeals. And the NPCC will continue to litigate against Qwest in Oregon for as long as necessary. However, without FCC guidance, that could be a long time. Assuming the NPCC prevails at the OPUC on refunds, Qwest is likely to appeal, since Qwest has shown no sign of relenting and Qwest's refund obligation is estimated to be in excess of $6 million in Oregon. Accordingly, the NPCC believes that if this Commission grants IPANY's petition, it would be very helpful in ensuring that refund disputes in Oregon and other states are resolved quickly. Possibly Qwest would finally relent based on clear guidance from the Commission. At a minimum, the Oregon PUC and courts would be able to quickly (and correctly) dispense with Qwest's spurious arguments.

III. QWEST'S AND VERIZON'S ARGUMENTS THEY DID NOT "RELY" ON THE *WAIVER ORDER* COMPLETELY MISCONSTRUE THE ORDER AND FRUSTRATE THE COMMISSION'S GOAL OF ELIMINATING DISCRIMINATION AS REQUIRED BY SECTION 276.

The New York court agreed with Verizon that Verizon did not rely on the *Refund Order* because Verizon failed to file new PAL rates between April 15 and May 19, 1997. Qwest is currently making the same argument in Oregon. This interpretation thwarts the Commission's essential purpose of implementing Section 276 in its *Payphone Orders*. Specifically, the Commission intended that all the financial provisions of the *Payphone Orders* were to be in place ***effective*** on April 15, 1997. The NST pricing requirement was an essential part of the entire scheme. Unless and until the RBOCs priced their PAL services based on cost—as established under the NST—the RBOCs would be continuing to discriminate against the PSPs in violation of Section 276(a)(2) and (b)(2)(C).

In order to ensure that the RBOCs took their obligations under the NST seriously and would comply with the pricing requirement, the Commission made compliance with the NST an express prerequisite to receiving dial around compensation ("DAC"). The *Waiver Order* and the *Refund Order* were not intended to upset this important balance and incentive scheme. Rather, the FCC "emphasized" that compliance in fact with the NST remained a prerequisite to the RBOC's entitlement to DAC. *Waiver Order*, ¶ 30 and *Refund Order*, ¶ 10. Since Verizon failed to file NST compliant rates by April 15, 1997, the only that way that the Commission can ensure that Verizon's PAL rates in New York complied with the NST effective on April 15, 1997, is to grant IPANY's petition and order refunds retroactive to that date.

The RBOCs all started collecting DAC on April 15, 1997 based on the premise that payphone providers would not be harmed:

> [C]ompeting PSPs will suffer no disadvantage. Indeed, the voluntary reimbursement mechanism discussed above – which ensures that PSPs are compensated if rates go down, but does not require them to pay retroactive additional compensation if rates go up – will ensure that <u>no purchaser of payphone services is placed at a disadvantage due to the limited waiver</u>.

RBOC Coalition Waiver Request Letter, April 11, 1997 (emphasis added). The effect of denial of refunds is to render this promise hollow and unfulfilled. Again, using Oregon as an example, Qwest will have charged its PSP competitors a rate of up to six times or more the rate it charged itself in 1997. From 1998 through 2003, Qwest will have charged itself three times the rate it charged itself. Discrimination of such a magnitude, for so many years, cannot possibly be reconciled with the RBOC's assertion that the PSPs "would not be placed at a disadvantage" due to the waiver. Only by ordering refunds can the discrimination be ameliorated.

The interpretation of what it meant to rely on or "take advantage" of the *Waiver Order* advocated by Qwest and Verizon and adopted by the New York Court of Appeals prevents implementation of key provisions of Section 276 of the Act until many years after April 15, 1997, in contravention of all of the Commission's *Payphone Orders*. The only interpretation of the *Refund Order* that will have the effect of timely implementing Section 276 is that an RBOC that did not have NST-compliant rates on April 15, 1997 but began collecting DAC effective on that date, "relied" on the *Refund Order* and must pay refunds retroactive to that date whenever new tariffs first found to comply with the NST take effect.

CONCLUSION

It is time for the FCC to end Qwest's and Verizon's charade. The Commission should ensure uniform enforcement of its *Payphone Orders* by declaring that RBOCs must either refund to PSPs any rates in excess of the lawful rates or to return illegally collected dial around compensation, retroactive to April 15, 1997.

DATED this 18th day of January, 2005.

Respectfully submitted,

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 The Illinois Public Telecommunications Association's Petition for a Declaratory Ruling Regarding the Remedies Available for Violations of the Commission's Payphone Orders.	)	CC Docket No. 96-128

COMMENTS OF THE NORTHWEST PUBLIC COMMUNICATIONS COUNCIL, THE MINNESOTA INDEPENDENT PAYPHONE ASSOCIATION, AND THE COLORADO PAYPHONE ASSOCIATION IN SUPPORT OF PETITION FOR A DECLARATORY RULING

The Northwest Public Communications Council, the Minnesota Independent Payphone Association, and the Colorado Payphone Association ("Associations") support the Illinois Public Telecommunications Association's ("IPTA") petition for a declaratory ruling. IPTA is correct that payphone service providers ("PSPs") are entitled to refunds where regional Bell operating companies ("RBOC") like SBC Illinois and Verizon[1] overcharge PSPs for payphone services under the new services test, and state commissions are preempted from

[1] These comments refer to Verizon as an RBOC because Verizon is the successor to former RBOCs NYNEX and Bell Atlantic as well as non-RBOC GTE and because the Illinois Commerce Commission applied the new services test to Verizon's rates. ICC Order, infra, at 21.

holding otherwise. IPTA is also correct that SBC Illinois and Verizon illegally collected dial around compensation for years without meeting the requirement that they must first set their rates according to the new services test. Long experience shows that state commissions and RBOCs will not implement these FCC requirements unless the FCC demonstrates that it will enforce them. A declaratory ruling directing all RBOCs either to refund new services overcharges to PSPs back to April 15, 1997 or to refund DAC to interexchange carriers ("IXC") is the best mechanism to achieve this result.

I. THE TELECOMMUNICATIONS ACT PREEMPTS STATE COMMISSIONS LIKE THE ILLINOIS COMMERCE COMMISSION FROM BARRING FCC-REQUIRED REFUNDS BASED ON STATE LAW

In 1997, the FCC issued an order mandating that that local exchange carriers ("LECs") such as RBOCs that relied on a waiver of certain tariff filing requirements must refund PSPs for overcharges where their rates filed in compliance with the new services test exceed their old, noncompliant rates:

> A LEC who seeks to rely on the waiver granted in the instant Order must reimburse its customers or provide credit from April 15, 1997 in situations where the newly tariffed rates, when effective, are lower than the existing tariff.

See Order, 12 FCC Rcd 21,370 at ¶ 25 (1997) ("1997 Refund Order")(emphasis added).

Based on the 1997 Refund Order, the IPTA asked the Illinois Commerce Commission ("ICC") to hold that SBC Illinois and Verizon (which relied on the above waiver) charged PSPs payphone services rates above the new services test limit and that SBC Illinois and Verizon should refund the overcharges to the PSPs. See IPTA Petition at 11. The ICC issued an order in 2003 holding that SBC Illinois and Verizon illegally overcharged the PSPs but refused to award refunds to IPTA because it would be "contrary to Illinois law" to order refunds, given that Illinois law prohibits refunds where rates have already been reviewed and approved by the

ICC. Interim Order, Docket No. 98-0195 at 43 (Nov. 12, 2003)("ICC Order"); see IPTA Petition at 6. This is known as the prohibition against "retroactive ratemaking" or the "filed rate doctrine."

The Telecommunications Act and related FCC orders preempt the ICC Order's holding that the ICC could not order refunds under Illinois state law. Section 276 of the Telecommunications Act states that FCC regulations preempt contrary state law:

> [T]o the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements.

47 U.S.C. § 276(c); Memorandum Opinion and Order, 17 FCC Rcd 2,051 at ¶ 7 (2002) ("New Services Order"). Pursuant to this section, the FCC held that any state regulation that prevents the implementation of cost based rates in compliance with the new services test, effective no later than April 15, 1997, was inconsistent with the federal law and preempted. Report and Order, 11 FCC Rcd 20,541 at ¶ 147 (1996)("1996 Report and Order"). The FCC's new services test requirements developed in its payphone orders were "implemented pursuant to section 276(b)(1) and would fall within the scope of the preemption provision." New Services Order at ¶ 38. So, if the ICC concluded that the FCC's refund mandate based on the new services test was contrary to Illinois law, then the FCC's mandate preempts Illinois law, not the other way around.

The ICC argues that the U.S. Supreme Court's decision in Arizona Grocery Co. v. Atchison, 284 U.S. 370 (1932) also prohibits the ICC from awarding refunds, but Arizona Grocery involved different facts. In that case, the Supreme Court prohibited the Interstate Commerce Commission, a federal agency, from engaging in retroactive ratemaking under federal law based on federally-filed tariffs. Id. at 381, 389. That is different from the Illinois Commerce Commission, a state agency, attempting to void an order of the FCC, a federal agency, based on state-filed tariffs. In sum, the Telecommunications Act and the FCC's orders preempt the Illinois law, and the FCC should so state in a declaratory ruling.

II. SBC ILLINOIS AND VERIZON ILLEGALLY COLLECTED DIAL AROUND COMPENSATION BECAUSE THEIR RATES VIOLATED THE NEW SERVICES TEST

In 1997 the FCC held that LECs, which includes RBOCs, cannot legally collect dial around compensation until they set their payphone services rates according to the new services test. LECs "will be eligible for [dial around] compensation like other PSPs when they have completed the requirements for implementing our payphone regulatory scheme to implement Section 276:"

> To receive compensation a LEC must be able to certify the following: . . . it has in effect intrastate tariffs for basic payphone services (for "dumb" and "smart" payphone); and . . . it has in effect intrastate and interstate tariffs for unbundled functionalities associated with those lines.

Order on Reconsideration, 11 FCC Rcd 21,233 at ¶ 131 (1997)(emphasis added). One of those requirements was that the intrastate tariffs described above must be set according to the "new services test required in the [1996] Report and Order [and] described at 47 C.F.R. § 61.49(g)(2)." Id. at ¶ 163 and n. 492. The FCC directed state commissions to determine whether RBOC rates met the new services test. Id. at ¶ 163.

The ICC Order concluded in November 2003 that "neither SBC's nor Verizon's existing rates are in compliance with the NST" or new services test. ICC Order at 46. Because SBC Illinois and Verizon's payphone rates did not comply with the new services test, SBC Illinois and Verizon could not legally collect dial around compensation. Yet SBC Illinois and

Verizon have collected "hundreds of millions of dollars" (Petition at 2) of dial around compensation anyway over the past several years. SBC Illinois and Verizon' self-certification in 1997 that their rates complied with the new services test provides no protection, as self-certification is no substitute for actual compliance as determined by state commissions.

Now that the ICC concluded that SBC Illinois and Verizon have not complied with the new services test, the FCC must issue a declaratory ruling stating that SBC Illinois and Verizon must either return the DAC to the IXCs who paid it or pay refunds for new services test overcharges to PSPs. If the FCC does not do so, it will effectively repeal a requirement established in a rulemaking without giving parties notice and an opportunity for comment, which the Administrative Procedure Act prohibits. 5 U.S.C. § 553(b).

III. CONCLUSION

SBC Illinois and Verizon, as well as other RBOCs, for years illegally failed to set their payphone services rates according to the new services test, illegally failed to refund overcharges to PSPs when they finally filed compliant rates, and illegally collected dial around compensation the entire time. The FCC has emphasized that actual compliance with the new services test was required under the FCC's orders. As stated in IPTA's Petition, the ICC found that neither SBC nor Verizon were in actual compliance, yet the ICC still failed to enforce these federal requirements for the time period from April 15, 1997 through December 13, 2003. SBC and Verizon violated FCC orders both (1) through failing to provide rates in compliance with the new services test rates effective April 15, 1997, and (2) by collecting DAC without complying with the FCC's condition precedent for eligibility. The FCC imposed both requirements for the express purpose of ensuring that PSPs would receive cost-based rates no later than April 15, 1997. Illinois, and some other states, have failed to implement these requirements. Yet still other states have implemented the FCC's orders and required refunds to PSPs. Enforcement of the same federal rights have ended in irreconcilably inconsistent results depending on in which state the PSP has payphones.

It is time for the FCC to end this game. A declaratory ruling like that described by IPTA is the best remedy. The FCC needs to address the uniform enforcement of its own orders by declaring that RBOCs must either refund to PSPs any rates in excess of the lawful rates or to return illegally collected DAC, and to order such other relief as the FCC deems appropriate.

DATED this 26th day of August, 2004.

Respectfully submitted,

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November 23, 2005

Chairman Kevin Martin
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

RE: CC docket 96-128

Dear Chairman Martin:

We are writing to request prompt Commission action in CC Docket 96-128, the Consolidation Petition proceeding. Commission action in the docket would allow states, including Oregon, to determine whether incumbent local exchange carriers are bound by the refund provisions of Commission Order DA 97-805 (the *Waiver Order*).

This letter is prompted by a specific issue we are addressing. Specifically, we must determine whether the *Waiver Order* requires Qwest to refund a portion of the intrastate Payphone Access Line (PAL) rates paid by Payphone Service Providers (PSPs) since April 15, 1997, because those rates do not comply with the "New Services Test" established in the Commission's *Payphone Orders*. This determination has been mandated by the Oregon Courts.

The Oregon Commission could, of course, interpret Order DA 97-885 in an order. If we were to do so, however, we are certain that either Qwest or the PSPs would appeal our decision. This would likely lead to several years of litigation concerning issues that can best be resolved by your Commission. The only way to avoid such a scenario would be for the Commission itself to interpret the *Waiver Order*. That is why we are requesting that the Commission act as expeditiously as possible in CC Docket 96-128.

Thank you for your consideration.

Lee Beyer Chairman	John Savage Commissioner	Ray Baum Commissioner

cc: Brooks Harlow, Miller Nash
Don Mason, Qwest